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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

BRYTON G. MELLOTT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 17-cv-2006
	)	
KENNETH D. SPRAGUE, JEREMY A. HALE, MATTHEW E. MCELHOE, and ANDREW J. CHARLES, in their individual capacities.	)	Judge Colin Stirling Bruce Magistrate Judge Eric I. Long
	)	
Defendants.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Bryton Mellott, by counsel, hereby responds to Defendants' Motion to Dismiss as follows:

STATEMENT OF FACTS[1]

On July 3, 2016, Plaintiff Bryton Mellott burned an American flag as an act of political protest. (Dkt. 1, Compl. at 3.) He did so in a friend's yard, chosen for its relative seclusion, on a rainy day, to minimize the possibility of causing a fire. *Id.* He later posted pictures of himself holding the burning flag on his Facebook page, with a caption explaining the social and political ills that he was protesting. *Id.* at 4. The pictures generated a great deal of comment. *Id.* at 4-5.

The following day, Defendant Kenneth Sprague, an Urbana police officer, called Mr. Mellott at his workplace and asked him about the flag burning. Mr. Mellott told Officer Sprague that he had burned the flag and posted the pictures on Facebook as a peaceful protest over the

[1] In considering a motion to dismiss under Rule 12(b)(6), the Court must "construe the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in [his] favor." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008) (citations omitted).

serious issues of police brutality, welfare, and income inequality. *Id.* at 6. Officer Sprague unsuccessfully tried to persuade Mr. Mellott to remove his Facebook post. After further investigation, Officer Sprague, along with Officers Jeremy Hale and Matthew McElhoe, came to Mr. Mellott's workplace and questioned him further, then placed him under arrest for violating the Illinois Flag Desecration Statute, 720 ILCS 5/49-1. Mr. Mellott was escorted from the building in handcuffs in view of coworkers and customers. *Id.* at 7. He was taken to the Champaign County Jail where he was detained for approximately five hours in a state of shock, fear, and anxiety. He was released after the State's Attorney's Office determined that the Illinois Flag Desecration Statute was unconstitutional. *Id.* at 8.

Mr. Mellott filed this action on January 11, 2017, claiming that his arrest under the Flag Desecration Statute violated his rights under the First and Fourth Amendments of the United States Constitution (as incorporated by the Fourteenth Amendment) and Article I, Secs. 4 and 6 of the Illinois Constitution.

ARGUMENT

I. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEIR ARREST OF PLAINTIFF VIOLATED HIS FIRST AND FOURTH AMENDMENT RIGHTS UNDER CLEARLY ESTABLISHED LAW.

To evaluate a qualified immunity defense, courts must consider "(1) whether the facts, taken in the light most favorable to the plaintiff, show that the defendant violated a constitutional right; and (2) whether that constitutional right was clearly established at the time of the alleged violation." *Gustafson v. Adkins*, 803 F.3d 883, 890-91 (7th Cir. 2015) (quoting *Hernandez v. Cook Cnty. Sheriff's Office*, 634 F.3d 906, 914 (7th Cir. 2011)). Here, Defendants concede that the complaint alleges a violation of the First and Fourth Amendments. (Dkt. 26, Mem. Supp. Motion to Dismiss at 3.) Thus, the only question before the Court is whether it was clearly

established on July 4, 2016, when Mr. Mellott burned a flag in political protest, that arresting him for flag desecration violated his First Amendment rights. It was. Indeed, few principles of First Amendment law are as well established as that one.

For decades, the Supreme Court has recognized that the First Amendment protects the use of the American flag for political expression. In *Spence v. Washington*, 418 U.S. 405 (1974), the Court held that a man could not be convicted of "improper use" of the flag for a window display of an upside-down flag with a peace symbol affixed to it. Later, the Court turned specifically to flag burning. In *Texas v. Johnson*, 491 U.S. 397 (1989), the Court held that a man's conviction for flag burning under the Texas flag desecration statute violated the First Amendment. The Court first noted that burning a flag as political protest was an act of speech for First Amendment purposes. 491 U.S. at 406. Moreover, the Texas flag desecration statute targeted the defendant's speech precisely *because* of its communicative force. *Id.* at 411. Since "Johnson's political expression was restricted because of the content of the message he conveyed," the Court applied "the most exacting scrutiny" to the state's claim that its interest in "preserving the special symbolic character of the flag" justified the prosecution of Johnson on the basis of his political speech. *Id.* at 412. The state was unable to satisfy that scrutiny, and Johnson's conviction was reversed.

The Court reached the same conclusion the following year in *United States v. Eichman*, 496 U.S. 310 (1990). There, the defendant was prosecuted under the federal Flag Protection Act of 1989, 18 U.S.C.A. § 700, enacted in the wake of *Texas v. Johnson.* The statute provided that a person who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States" was guilty of a criminal offense. As in *Johnson*, the Court held that burning a flag in protest was speech protected by the First

Amendment, that the statute at issue sought to punish the defendant for the content of such speech, and that the prosecution therefore violated the First Amendment.

The operative language of the Illinois Flag Desecration Statute is virtually identical to the federal statute considered in *Eichman*. *Compare* 720 ILCS 5/49-1(b)(4) ("A person commits flag desecration when he or she knowingly . . . publicly mutilates, defaces, defiles, tramples, or intentionally displays on the ground or floor any [United States flag]") *with* 18 U.S.C.A.§ 700(a)(1) ("Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States" is guilty of an offense). In light of *Eichman*, any reasonable officer would know that the Illinois statute was unconstitutional as applied to the burning of a flag for expressive purposes.

For this reason, the Eighth Circuit recently rejected a qualified immunity defense in a case on all fours with this one. In *Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. 2014), officers arrested a man under the Missouri flag desecration statute[2] after he attempted to burn a flag in his front yard, then shredded it with a knife. After he had spent several hours in jail, the prosecutor dismissed the charges, having learned from a reporter about the *Texas v. Johnson* case. *Snider*, 752 F.3d at 1154.

The court held that the arresting officer was not entitled to qualified immunity because the law relating to flag desecration was clearly established. "Beginning in 1974, with *Spence*, and culminating in 1989 and 1990, with *Texas v. Johnson* and *Eichman*, the Supreme Court clearly established the First Amendment prohibits the prosecution of an individual for using the

[2] The Missouri statute is virtually identical to the Illinois statute: "A person commits the offense of desecrating a flag if he or she purposefully and publicly mutilates, defaces, defiles, tramples upon or otherwise desecrates the national flag of the United States or the state flag of the state of Missouri." Mo. Ann. Stat. § 578.095(1).

American flag to express an opinion. This right had been clearly established for twenty years [at the time of the plaintiff's arrest], and, thus, a reasonably competent officer would have known [the plaintiff]'s expressive conduct was constitutionally protected." *Snider*, 752 F.3d at 1156. The same is true here. Bryton Mellott burned an American flag as an act of political expression that was established in *Texas v. Johnson* and *Eichman* to be protected by the First Amendment. Defendants arrested and jailed him under a flag desecration statute virtually identical to the one in *Eichman*, which the Supreme Court held was unconstitutional as applied to political flag burning. As in *Snider*, a reasonable officer would have known that the arrest violated the First Amendment.

Defendants' reliance on *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003), is unavailing. There, social workers entered a private school without a warrant to investigate child abuse allegations. Although their conduct violated the Fourth Amendment, the Seventh Circuit granted them qualified immunity because they acted under a presumptively valid state statute. 327 F.3d at 516. Contrary to Defendants' suggestion, however, the court's qualified immunity holding was not based solely on the absence of controlling case law on the *specific* Wisconsin statute at issue. Rather, the court emphasized that there was "no reported decision (state or federal) addressing the precise issues before us." *Id.* In contrast, *Texas v. Johnson* and *Eichman* do, in fact, address the precise issues involved in this case. Those cases hold that a person who burns a flag in political protest may not be arrested under a flag desecration statute. And in *Eichman*, the statute at issue used almost exactly the same language as the Illinois statute here.

As the Seventh Circuit explained in *Doe v. Heck*, officers are not entitled to qualified immunity based on their reliance on a statute that is "grossly and flagrantly unconstitutional"

327 F.3d at 516 (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979)). Courts have recognized that even when a particular statute has not been invalidated by any court, it is "grossly and flagrantly unconstitutional" if the same or very similar legislative language has been struck down in a controlling precedent. For example, in *Leonard v. Robinson*, 477 F.3d 347 (6th Cir. 2007), a police officer arrested the plaintiff under disorderly conduct and obscenity statutes for using profanity at a public meeting. Although the obscenity statute had previously been held unconstitutional by the state's highest court, the officer argued that he was entitled to qualified immunity because the disorderly conduct statute, which prohibited "indecent or obscene conduct in a public space," separately supported probable cause and had never been invalidated. The Sixth Circuit disagreed, holding that the disorderly conduct statute "so closely track[ed]" the language of the previously invalidated obscenity statute "that it is flagrantly unconstitutional" as applied to speech. 477 at 356. *See also Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873, 881 (9th Cir. 2002) (denying qualified immunity to officer who arrested the plaintiff under statute requiring individuals to identify themselves during a *Terry* stop, where similar statutes—though not the statute at issue in the case—had previously been invalidated by the Ninth Circuit.)

Thus, in a case much like this one, a Wisconsin district court rejected a qualified immunity defense for officers who arrested a man under a flag misuse statute that had not yet been ruled unconstitutional. *Koser v. County of Price*, 834 F. Supp. 305 (W.D. Wis. 1993). In *Koser*, the plaintiff was arrested under a statute that prohibited the public display of "a flag upon which has been placed or attached a word, mark, design, or advertisement not properly a part of such flag." 834 F. Supp. at 308. The court rejected the officers' contention that "they were entitled to act in reliance on a state law that had never been held to be unconstitutional." *Id.* at

310. The court explained that in *Spence*, the Supreme Court invalidated a statute that was "identical in all essential ways" to the Wisconsin statute, and that in *Texas v. Johnson*, the Court had "defin[ed] the very limited circumstances in which even the total destruction of the flag would be a justification for an arrest." *Id.* The contours of the law were sufficiently clear to put a reasonable officer on notice that an arrest under the Wisconsin statute would violate the First Amendment. *Id.*

The same is true here. *Texas v. Johnson* clearly establishes that Plaintiff had a right to burn a flag as a means of political expression, and *Eichman* clearly establishes that a statute identical to the Illinois Flag Desecration statute is "grossly and flagrantly unconstitutional" as applied to such expression.

Defendants nonetheless insist that the Illinois statute is not "grossly and flagrantly unconstitutional" because "licensed Illinois attorneys in the State's Attorney's Office took several hours to research the Illinois Flag Desecration statute before requesting the release of Plaintiff from custody, and took a full day to decide not to charge Plaintiff under the statute . . . " (Dkt. 26 at 6.) The arresting officer made the same argument—unsuccessfully—in *Snider*, the Eighth Circuit flag desecration case. The court denied qualified immunity to the arresting officer even though the local prosecutor was unaware of *Texas v. Johnson* until a local reporter informed him about it, and even though a local magistrate judge had issued a warrant for Snider's arrest under the flag desecration statute. "A reasonably competent officer in Officer Peters' position would have concluded no arrest warrant should issue for the expressive conduct engaged in by Snider." 752 F.3d at 1157. Thus, qualified immunity was inappropriate notwithstanding the "unfortunate and fairly inexplicable" failure of the prosecutor and magistrate judge to correct the error. *Id.*

Here, as in *Snider*, the relevant precedents have been in place for decades and apply unambiguously to the facts set forth in the complaint. Because those precedents clearly establish that Defendants violated Plaintiff's constitutional rights, and that the Illinois Flag Desecration Statute is "grossly and flagrantly unconstitutional," qualified immunity should be denied.

II. PLAINTIFF IS ENTITLED TO SEEK DECLARATORY JUDGMENT UNDER THE ILLINOIS CONSTITUTION.

Defendants argue that Plaintiff has no cause of action under the Illinois Constitution because Article 1, Sections 4 and 6 lack self-executing provisions and because federal remedies exist. (Dkt. 26 at 10-11.) The cases cited by Defendants appear to foreclose a claim for damages under the state constitution. However, Plaintiff is still entitled to, and intends to seek, a declaration that Defendants' actions in enforcing the Illinois Flag Desecration statute violated the state constitution. *See Wagner v. Evans*, 2016 WL 397444, at *5 (N.D. Ill. Feb. 2, 2016) (declining to dismiss state constitutional claims, including Article I, Sections 4 and 6, where the plaintiff sought only declaratory and injunctive relief for his state constitutional claims); *Peterson v. Village of Downers Grove*, 103 F. Supp. 3d 918, 920-21 (N.D. Ill. 2015) (considering claims for declaratory and injunctive relief under Article I, Section 4 where the question of whether or not there existed a private right of action was not raised); *Kole v. Village of Norridge*, 941 F. Supp. 2d 933, 959 (N.D. Ill. 2013) (declining to dismiss a claim for declaratory judgment under Article I, Section 2; Article I, Section 4; and Article I Section 6 where the requested relief was construed as being sought under the federal declaratory judgment statute, 28 U.S.C. § 2201).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendants' Motion to Dismiss be denied.

DATED: April 10, 2017

Respectfully submitted,

/s/ Rebecca K. Glenberg

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CERTIFICATE OF SERVICE

I, Rebecca K. Glenberg, an attorney, hereby certify that on April 10, 2017, I electronically filed the foregoing PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Rebecca K. Glenberg
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